STATE OF MICHIGAN

COURT OF APPEALS

THOMAS BYRNE and JODY BYRNE,

Plaintiffs-Appellees,

v

JAL PROPERTIES, INC.,

Defendant/Cross-Defendant-Appellant,

and

EDGAR POBUR and KELLY POBUR,

Defendants/Cross-Plaintiffs-Appellees,

and

BILL'S TREE CO.,

Defendant.

UNPUBLISHED
July 3, 2003

No. 234829
Oakland Circuit Court
LC No. 99-013422-CZ

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant JAL Properties, Inc. (herein "defendant") appeals as of right the trial court's entry of a judgment awarding plaintiffs Thomas Byrne and Jody Byrne, husband and wife, $151,827 damages against defendant, following a jury verdict awarding plaintiffs $50,609 in damages and the trial court's grant of plaintiffs' motion to treble damages pursuant to MCL 600.2919(1). We affirm the verdict in favor of plaintiffs, but reverse the trial court's award of treble damages. We remand for apportionment of the jury award of damages.

I

Plaintiffs brought this action for negligence and trespass against defendant, Bill's Tree & Company, Inc. ("Bill's Tree"), and Edgar and Kelly Pobur (the Poburs), husband and wife. Plaintiffs and the Poburs purchased adjoining lots in the Prestwick Village site subdivision for

detached condominiums. The Poburs were the first to start construction, and they hired defendant as the general contractor for their home. Defendant hired several subcontractors to perform work, including Bill's Tree, which was hired to clear the Pobur's building site. Defendant and its subcontractors used plaintiffs' lot for access to the Poburs building site. Plaintiffs filed this action for damages when they discovered that their lot was being used without their permission and that numerous trees were felled.[1]

Defendant admitted that its subcontractors used a portion of plaintiffs' lot as an access road to the Poburs' building site and that numerous trees were felled on plaintiffs' property. However, defendant denied that either it or any of its subcontractors destroyed or damaged any trees on plaintiffs' lot. Defendant claimed that the only trees removed from plaintiffs' property were trees that were already knocked down by a storm. The jury awarded plaintiffs $50,609 in damages against defendant. Plaintiffs moved for treble damages pursuant to MCL 600.2919(1). The trial court granted plaintiffs' motion and subsequently entered a judgment awarding plaintiffs $151,827.

II

Defendant challenges the jury verdict on several grounds. We conclude that relief is unwarranted on any of the grounds asserted.

A

Defendant claims that the trial court erred in denying its motion for directed verdict with regard to plaintiffs' negligence and trespass claims. Defendant argues that plaintiffs failed to establish that defendant did anything wrong. Further, defendant's "general oversight" of the subcontracted work is insufficient as a matter of law to establish liability, and plaintiffs introduced no evidence on which any of the exceptions to the general rule of nonliability for independent contractors would apply. Thus, defendant was entitled to a directed verdict. We disagree.

1

This Court reviews de novo the grant or denial of a directed verdict. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). In reviewing the trial court's decision, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id.* at 679. A directed verdict is properly granted only when no factual questions exist on which reasonable jurors could differ. *Id.* at 679-680. If reasonable jurors

[1] The Poburs filed a cross-claim against defendant and Bill's Tree. Eventually, plaintiffs settled their claims against Bill's Tree and the Poburs, and the Poburs settled their claim against defendant and Bill's Tree. By the time of trial, only plaintiffs' claims against defendant remained outstanding.

could reach conclusions different than this Court, then this Court must not substitute its judgment for that of the jury. *Id.* at 680.

2

It is well-established that, as a general rule, an owner or a general contractor is not liable in negligence to a third party for the acts of independent contractors hired to perform work. *Funk v General Motors Corp,* 392 Mich 91, 100-101; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc,* 414 Mich 29, 37-38; 323 NW2d 270 (1982); *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). However, a general contractor may be held liable for its own negligence, with regard to its own acts and those of independent contractors, under certain circumstances. *Ormsby v Capital Welding, Inc,* 255 Mich App 165, 173; 660 NW2d 730 (2003);[2] *Holmes v Gargaro Co,* 368 Mich 589, 593; 118 NW2d 697 (1962); *Candelaria, supra* at 72, 74. "The scope of a general contractor's responsibility will often depend on the nature of the risk and of the precaution or safeguard claimed to have been omitted." *Funk, supra* at 101.

One exception to the general rule of a general contractor's nonliability for acts of independent contractors is the doctrine of "retained control." "An owner is responsible if he does not truly delegate—if he retains 'control' of the work…." *Id.* This exception is appropriately applied where a general contractor retains at least partial control and direction of the construction work, beyond safety inspection and general oversight. *Candelaria, supra* at 75-76. That is, the general contractor not only possesses supervisory and coordinating authority over the job site, but actually exercises this authority to affect the manner or environment in which the work is performed. *Ormsby, supra* at 184.

In this case, defendant admitted using plaintiffs' property as a means of ingress and egress for the Poburs' building site. Defendant's owner, John Lotoczky, who also lived in the Prestwick Village subdivision, testified that his subcontractors used plaintiffs' lot to gain access to the Poburs' lot, and that he should have asked plaintiffs' permission, but did not. He stated that the reason he had to enter on plaintiffs' lot was that the Poburs' lot had a large mound of dirt in the front of the lot, which he had created, partially from the excavation of the Poburs' basement. There was also testimony that using plaintiffs' property was a faster or more convenient route to the Poburs' building site. Lotoczky admitted clearing underbrush for the road, but maintained that no trees were cut.

Two of defendant's subcontractors, Bill's Tree,[3] and Bill Budds Bulldozing, the grading contractor, testified and admitted that they drove their equipment on the construction road on plaintiffs' lot to access the Poburs' building site. Although both contractors denied damaging

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[2] *Ormsby* was decided after the decision in this case, and clarifies the *Candelaria* analysis of the retained control doctrine. *Ormsby, supra* at 183-185.

[3] The Bill's Tree employee testified that he and his employees used plaintiffs' property to access the Poburs' site and that their work preceded the excavation of the Poburs' basement.

any live trees in the course of using plaintiffs' property, evidence established that other subcontractors also used plaintiffs' property in constructing the Poburs' home, including cement trucks. Plaintiff Thomas Byrne testified that when he first met with Lotoczky about the use of plaintiffs' property and the damage to the trees, Lotoczky told Byrne that he was doing plaintiffs a favor by removing the trees.

It is clear that a general contractor may be held liable for damages resulting from activities within the general contractors' direct control. In *Holmes, supra*, the Supreme Court found no error in a finding of liability on the part of two general contractors in the construction of a drain project where damages resulted to the plaintiffs' home from a supplier's trucks lining up to deliver cement. In *Holmes*, the defendants, general contractors, were hired by Wayne County to construct a drain, and in turn purchased concrete for the drain lining from another company. *Id*. at 590. The defendants directed the amount of cement and the time and place of delivery. *Id*. The plaintiffs testified that the trucks, lining up in front of their home for delivery, caused vibrations that damaged their home.[4] *Id*. at 591. The Court rejected the defendants' argument that the damage was caused by independent contractors over whom the defendants had no control:

> "Defendants further contend that the trucks were owned by the supplier, an independent contractor over whom they had no control. However, according to the testimony, the defendants were general contractors and had control over the supplier's trucks. Defendants ordered materials and had them delivered at specified periods of time. It was having these materials delivered at specified periods of time that accounted for the trucks being required to stand in procession and in such large numbers. This, in turn, according to the testimony, produced the vibration and damage to plaintiff's home." [*Id*. at 593, quoting the opinion of the circuit court.]

Liability in this case is premised on circumstances similar to those in *Holmes*. Given the testimony and evidence in this case, we find no error in the court's ruling that defendant was liable for the subcontractors' actions with regard to the use of plaintiffs' property in constructing the Poburs' home. Whether securing ready access to the building site is viewed as within defendant's direct responsibility as general contractor or is viewed as a matter of "retained control," we reject defendant's argument that it is absolved of liability under the general rule of nonliability for independent contractors.[5]

It is undisputed that defendant, as general contractor, hired various subcontractors to carry out the construction of the Poburs' home. Certainly, the subcontractors would have to have

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[4] The trucks weighed between forty and fifty thousand pounds, and five to ten trucks would line up in front of the plaintiffs' home with their motors running while waiting to unload. *Holmes, supra* at 590-591.

[5] Nonetheless, this conclusion does not preclude a finding in this case that the independent contractors were also at fault for the damages, as discussed in part V, *infra*.

access to the building site to complete their work. In ensuring ready access, defendant made use of plaintiffs' property over the course of several months without their permission, even after being contacted by plaintiffs, and even after issuance of a temporary restraining order. In this case, what defendant directed or failed to direct his subcontractors to do resulted in the continuing use of plaintiffs' property to defendant's advantage. See *Candelaria, supra* at 76, quoting *Funk supra* at 108 (observing that the defendant's representative and his assistants did more than observe whether the contract was being properly performed in that "*what they said, or left unsaid, determined how the work would be performed*.").[6]

3

In conjunction with its argument that it was entitled to a directed verdict on the issue of liability, defendant also argues, in essence, that it was entitled to a directed verdict on the alternative ground that MCL 600.2919(1) is inapplicable because it provides liability for treble damages only for active misconduct and there was no evidence that defendant or any of its employees cut down any trees. Defendant failed to properly raise this issue in its statement of questions presented. Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, we do not conclude that the requirement of active misconduct precludes the award of treble damages merely because the liability in this case is based on the actions of subcontractors.

MCL 600.2919(1) provides:

> Any person who:
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> (a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on another's lands, or
>
> (b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or
>
> (c) cuts down or carries away any grass, hay, or any kind of grain from another's lands without the permission of the owner of the lands . . . is liable to the owner of the land . . . for 3 times the amount of actual damages. If upon the trial of an action under this provision or any other action for trespass on lands it appears that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that the wood, trees, or timber taken were taken for the purpose of making or repairing any public road or bridge judgment shall be given for the amount of single damages only.

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[6] Generally, whether a general contractor had retained control is a question of fact for the jury, *Ormsby, supra* at 185 n 5, however, defendant does not claim error in this regard.

The statute is not designed to impose liability absent active misconduct. *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982).

Lotoczky testified that plaintiffs' property was used to access the Poburs' building site throughout the project and for the project as a whole, not just as an isolated incident. Further, it was undisputed that this involved cutting underbrush on plaintiffs' property. Based on the evidence, the jury could reasonably infer that defendant had an active role in use of plaintiffs' property and therefore in the destruction of the trees. *Ormsby, supra* at 184. In order to avoid treble damages, the defendant has the burden of proving that the trespass was casual and involuntary rather than willful. *Stevens, supra*.

Further, even under the theory of retained control, the focus of the claim is on the general contractor's own negligence and is properly viewed as a matter of direct liability, rather than vicarious liability. *Candelaria, supra* at 74 n 1. We find no error in the court's denial of defendant's motion for a directed verdict.[7]

III

Defendant also claims that the court erred in denying its motion for a directed verdict on plaintiffs' set-back claim. Defendant moved for a directed verdict on the set-back claim, arguing that plaintiffs failed to properly raise their claim concerning the zoning variance. Defendant argued that plaintiffs should have raised their objections before the zoning board or timely filed an appeal of the zoning decision. Plaintiffs responded that they had no standing to appeal the zoning board's decision, and regardless, the zoning board has no power to override private deed restrictions. The court agreed with plaintiffs and denied defendant's motion. We find no error requiring reversal.

It is undisputed that the porch extension on the Poburs' home violated the side set-back requirement established by the township zoning ordinance in that the porch was less than fifteen feet from the property line. It is also undisputed that the Poburs were granted a variance from the zoning restriction for the side setback.

Defendant argues on appeal that plaintiffs' complaint failed to allege any claim based on the deed restrictions or the Preswick Village Condminium Association bylaws; rather, their claim was based on an alleged zoning ordinance violation.[8] We agree. In response to defendant's

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[7] Nonetheless, as discussed *infra*, part IV, we conclude on other grounds that the award of treble damages was error requiring reversal.

[8] Plaintiff' complaint alleged that the Poburs filed a lawsuit against Highland Township, and, in September 1999, a consent judgment was entered allowing the zoning variance with regard to the set back requirement. Plaintiffs alleged that they were damaged as a result of the consent judgment because the Poburs' home was closer to the property line than authorized by the local ordinance and because trees were destroyed that acted as a shield between the Poburs' and plaintiffs' homes.

motion for directed verdict, plaintiffs argued that the zoning variance violated the subdivision deed restrictions; however, plaintiffs' complaint did not allege damages arising from the deed violation, and plaintiffs did not move to amend the pleadings. MCR 2.118(C)(1). Thus, plaintiffs failed to properly raise their set-back claim based on a violation of the deed restrictions and the bylaws.

Nonetheless, defendant did not raise this ground as the basis for its motion for directed verdict before the trial court.[9] We therefore find no error requiring reversal.[10] Grounds for sustaining a directed verdict that were not articulated to the trial court will not be considered on appeal. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

IV

Defendant argues that the court committed error requiring reversal regarding several jury instructions. Although we agree that the jury instructions and the verdict form may not have properly stated the issues that should have been decided by the jury, we find no basis for reversal of the jury verdict.

Defendant expressed numerous objections to the instructions and the verdict form and submitted its proposed instructions and verdict form as "counter-proposals." We find the record unclear concerning the parties' positions and the trial court's resolution of several errors alleged on appeal. It appears that the ultimate resolution of defendant's verdict form objections was not on the record. Further, defendant's general objections[11] and the submission of defendant's preferred version of the instructions and the verdict form as special exhibits are inadequate for this Court to resolve the specific issues presented. Our review of the record convinces us that reversal of the jury verdict is unwarranted, but that error in the verdict form calculating only an aggregate damage amount, agreed to by both parties, precludes the award of treble damages.

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[9] Defendant only raised this issue later, during the discussion of jury instructions. Even if we agreed that it was error for the court to deny the directed verdict on the basis argued by defendant, we would conclude that relief was unwarranted because defendant suggested that the jury form not request specific damages with regard to the set-back claim, as discussed *infra*, part IV.

[10] To the extent that plaintiffs argue on appeal that they properly set forth a nuisance claim, we reject this argument. In response to defendants' objection that plaintiffs failed to plead a nuisance claim and therefore were not entitled to a nuisance instruction, plaintiffs specifically requested that their set-back claim be framed merely as a set-back violation, rather than a nuisance, in the jury instructions and verdict form.

[11] Defendant had multiple objections to the jury instructions, including that they were not supported by the law, that there were standard jury instructions that were supported by the law and were not being given, and that plaintiffs' special jury instructions were not supported by the law or the facts and circumstances in this case.

A

This Court generally reviews claims of instructional error de novo, *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001), although a trial court's determination whether a standard instruction was applicable and accurate is reviewed for an abuse of discretion, *Stevens v Veenstra*, 226 Mich App 441, 442-443; 573 NW2d 341 (1997), and its determination whether an instruction is supported by the evidence is entitled to deference, *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). This Court examines the jury instructions as a whole to determine whether the trial court committed error requiring reversal. *Burnett , supra.* Reversal is warranted only where failure to reverse would be inconsistent with substantial justice. *Id.*; MCR 2.613(A). "When the standard jury instructions do not adequately cover an area of law, the trial court is obligated to read supplemental instructions requested by one of the parties, as long as those instructions properly inform the jury on the applicable law." *Burnett, supra.*

B

Defendant argues that the court erred in rejecting defendant's proposed special instructions that essentially instructed the jury that defendant was not liable for any negligence or cutting of trees by Bill's Tree or Bill Budds Bulldozing if they were independent contractors. In light of our discussion concerning defendant's liability, *supra* part II, we find no error. For the same reason, we reject defendant's claim of instructional error with regard to treble damages under MCL 600.2919(1) because defendant's liability is not merely passive or vicarious.[12]

With regard to defendant's remaining claims of instructional error, reversal is unwarranted. Given plaintiffs' claims and the evidence, the verdict is not inconsistent with substantial justice. The jury found liability on the basis of plaintiffs' trespass claim and the cutting of the trees, as well as the set-back claim, and assessed damages accordingly. The jury awarded plaintiffs damages of $50,609. Plaintiffs' expert testimony established damages of $48,272 related to the property damage and lost trees. Additionally, plaintiffs requested a nonspecific amount of damages for the trespass itself and the set-back violation. Defendant argued that if the jury found liability, it should award damages, if at all, in the amount of $5,000, the cost of restoring the ground. It is clear that the jury rejected defendant's argument.

Although we agree with defendant that the set-back instruction could be viewed as error, as discussed, *supra*, with regard to the motion for a directed verdict, the verdict may or may not include an amount of damages for the setback violation. Even assuming that it does, we decline to reverse the jury award because the parties stipulated to the award of a single damage amount if the jury found liability on any of the three bases submitted to the jury. Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Farm Credit*

[12] Procedurally, this is not properly viewed as an instructional error because treble damages were awarded by the trial court in response to plaintiffs' motion following the jury verdict.

Services of Michigan's Heartland, PCA v Weldon, 232 Mich App 662, 683-684; 591 NW2d 438 (1998). A party cannot stipulate to a matter, and then argue on appeal that the resultant action was error. *Weiss v Hodge (After Remand),* 223 Mich App 620, 636; 567 NW2d 468 (1997).

Nonetheless, we find that the error in the verdict form, which required the jury to determine only a single aggregate damage amount, precludes the award of treble damages. Our review of the record regarding the verdict form indicates that both parties contributed to this error:

> [Defense Counsel] The standard jury instructions on verdict forms, your Honor, the language used is did the plaintiff sustain damage in one or more of the ways claimed by plaintiffs.
>
> [Court] That simplifies it even further.
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> [Defense Counsel] That's the one question—you don't ask for specific damages--
>
> [Plaintiffs' Counsel] I agree to that. I agree to that.
>
> [Defense Counsel] There it is, right there.
>
> [Court] One question.

Because damages were not separately determined with respect to liability under MCL 600.2919(1), pursuant to which plaintiffs subsequently sought treble damages, the damage award may not be trebled.

MCL 600.2919(1) provides for treble damages unless the defendant establishes the affirmative defense of involuntary or unknowing trespass, but there is no basis for trebling damages for violation of a setback. The trial court's grant of plaintiff's motion to treble the damages awarded by the jury is inconsistent with substantial injustice. Whether viewed in terms of the instructional error in submitting the set-back claim to the jury or in terms of an error in the verdict form, we conclude that the award of treble damages is error requiring reversal. Further, because both parties contributed to this error, we conclude that reversal of the jury verdict on this basis is unwarranted. *Farm Credit Services, supra*; *Weiss, supra*.

V

Defendant argues that the trial court erred in denying defendant's request that the jury be allowed to apportion the percentage of fault of settling parties and of nonparties pursuant to MCL 600.6304. We agree that MCL 600.6304 applies in this case.

MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing

> percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Pertinent subsections of MCL 600.6304 provide the procedures for implementing apportionment of fault:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
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> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.
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> * * *
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> (3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party . . . .
>
> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is found jointly and severally liable under section 6312.
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> * * *
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> (8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party. [MCL 600.6304.]

Here, it appears the trial court determined that apportionment of damages among defendant, Bill's Tree, the Poburs, and other involved subcontractors was unwarranted because, as a general contractor with retained control over the project, JAL was vicariously liable for their

conduct.[13] As discussed *supra*, this is an incorrect interpretation of the law: any liability defendant must bear for its subcontractors' actions is based on a theory of its own liability, not vicarious liability. Accordingly, the trial court should have instructed the jury to apportion damages. *Kokx v Bylenga*, 241 Mich App 655, 662-663; 617 NW2d 368 (2000).

In this case, defendant, as well as the two subcontractors that testified, admitted using plaintiffs' property, but denied cutting any trees. Although defendant may be liable to the extent it directed the result, on the facts of this case, the subcontractors and the Poburs could be found liable for their own independent fault in causing the damages. See *Ormsby*, *supra* at 192-193. Any other view would be anomalous because before trial, plaintiffs agreed to monetary settlements with both the Poburs' and Bill's Tree, who were also defendants in this case. The earlier recovery was not taken in account in the verdict. The jury assessed damages with respect to plaintiffs' entire claim. To allow plaintiffs to recover the entire amount of their claim from defendant as well as partial damages from the settling parties results in "double-dipping."

MCL 600.6304 applies under the facts and circumstances of this case. To the extent that the procedures have been followed for an apportionment of fault for others liable for the plaintiffs' damages, MCR 2.112(K), the trial court erred in denying defendant's request for an apportionment of fault.

VI

We affirm the jury verdict with regard to liability and the aggregate damages. We reverse the award of treble damages and reverse the award of damages against defendant. We remand for further proceedings for consideration of apportionment of damages pursuant to MCL 600.6304.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly

[13] Neither plaintiffs nor the trial court cited MCL 600.2956, which preserves "an employer's vicarious liability for an act or omission of the employer's employee," notwithstanding the abolition of joint and several liability in other contexts. This provision does not apply here, because none of the subcontractors was defendant's employee, and defendant's liability under the retained control doctrine is not vicarious liability for another party's conduct.